

# The Last Chapter?

## FTC Commissioners Rule in Favor of Dominican Hospital

by Mary Bryant

**D**rawing to a close years of debate enveloping the purchase of AMI's Community Hospital by Dominican Santa Cruz Hospital, U.S. Federal Trade Commissioners voted to accept a settlement offer advanced by hospital attorneys to close any on-going investigations into the activities surrounding the acquisition.

The consent decree forwarded by Dominican Hospital directors was accepted by FTC Commissioners on August 18, 1994, an agreement that was first offered to the federal agency in January, 1992, following a nearly one year probe into the effects of the takeover of the North County hospital market by Dominican officials. After the consent decree was tentatively approved in March, 1993, Commissioners accepted and reviewed public comments to

their decision prior to making their recent final ruling.

With the announcement on August 29, FTC Commissioners agreed to end the inquiry into what impacts the purchase might have had on competition in the North County hospital market in exchange for a promise from Dominican Hospital leaders not to purchase any other hospital (for a price more than \$2 million) in Santa Cruz County for a period of 10 years. That is without first gaining the approval of the FTC Commissioners.

"We are truly elated that this chapter is closed," said Sister Julie Hyer, president of Dominican Santa Cruz Hospital. "I absolutely believe we would have been successful if we had been required to defend our decision to purchase AMI's Hospital in federal court. However, I am very pleased we will not be pressed to spend the millions of dollars in legal fees necessary to meet such a challenge. ... We would much rather

have those funds available to address the local needs of our community."

The federal decision also binds Dominican Hospital's affiliate health system Catholic Healthcare West to the agreement.

### Little Penance

In executing the consent decree, Dominican officials deny any wrong doing as a result of the purchase of AMI's facility, while FTC attorneys do not ask the hospital to acknowledge any violations of law. FTC attorneys associated with the case have acknowledged in previous interviews that under the Hart-Scott-Rodino pre-merger regulations, Dominican leaders were exempt from filing with the FTC because the final price of \$11.25 million fell below the threshold of purchases requiring pre-acquisition FTC review.

Had FTC Commissioners pressed their case with the courts, they would have had to successfully argue that the benefits to the community of the combined operations of the two hospitals would be outweighed by the impacts of the purchase on future competition in the market.

With strong and active hospitals surrounding Dominican Hospital in nearby markets, Dominican Hospital's history of dominance in the market during the time when Community was open, and a new small acute care hospital currently under construction within a mile of Dominican's central campus, it might have been difficult to prove Dominican's purchase of AMI's hospital irrefutably impaired competition.

In a somewhat similar case in Ukiah, California, where FTC attorneys had fewer obstacles to overcome in proving their case, the administrative law judge reviewing the claims rejected the FTC contention that the purchase of a hospital by a competing hospital — even in a geographically contained market — impaired competition.

"Technically what happened was the case was tried before the

administrative law judge. The administrative law judge ruled against the commission and the appeal is taken back to the full set of commissioners. They affirmed the finding of the administrative law judge," said John Weigand, a FTC attorney. "We as commission staff cannot appeal a decision of the commissioners. So when the commission rules in favor of the defendants in the case, then the case is over. ... The Ukiah case is completely over and defendants won that case."

Not that FTC Commissioners don't score many victories. On a playing field where the transactions are often in the billions of dollars FTC regulators are frequently responsible for stopping mergers and acquisitions.

In Pueblo County, Colorado, FTC attorneys sought a court order to temporarily block the merger of the only two general acute-care hospitals in the area, saying the acquisition of the Parkview Episcopal Medical Center hospital

by the Sisters of Charity Healthcare Systems could create a monopoly and violate the antitrust laws. In Colorado, hospital leaders said that they believed the FTC did not fully appreciate the financial stresses the hospitals were enduring.

FTC regulators will also likely be busier in pursuing years.

As part of on-going reform strategies aimed at reducing or containing the costs of health care, and in recognition of the many technological advances that allow patients to be cared for at home, it is anticipated that more hospitals will merge or affiliate in the future. As many as 530 of the nation's community hospitals (about 10 percent of the market) are expected to be closed by the turn of the century, according to an authority at Northwestern University. The American Hospital Association estimates that about one-third of America's hospital beds go empty

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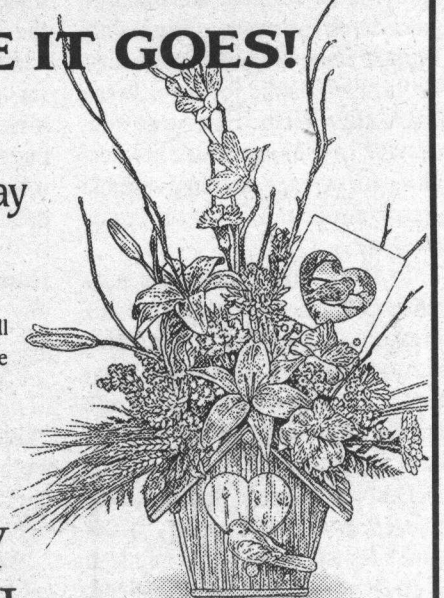
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every night. Not that everyone was happy about the FTC ruling that upheld the acquisition.

### Not Happy With Deal

When Dominican Hospital administrators were negotiating with American Medical International to purchase the for-profit conglomerate's small acute care center in late 1989, they were not alone. Also competing to buy the hospital was a group of doctors urged on by Wayne Boss, president of the Santa Cruz Medical Clinic and a former Dominican administrator.

While Boss had great enthusiasm for the venture, what he lacked was money to make a bid. Boss sought and failed to win the support of a hospital partner to provide investment and operating capital to open negotiations with AMI.

Without a hospital partner, Boss stood little chance of getting close to the final price of \$11.25 million paid by Dominican officials.

*"We believe we will also prevail in district court. ... Although, I would like to add that we have found that sometimes it costs almost as much to be proven right as it does to be proven wrong."*

— Sister Julie Hyer

Without a hospital partner, Boss never made an offer to AMI. However, even after the ink was dry on the final sales contract, Boss wasn't done.

Encouraged by pro-choice activists concerned that Dominican president Sister Hyer would not be able to convince church leaders of the need to amend hospital policies applying to surgical sterilization procedures for women, Boss aptly kept the issue of choice in the market in sharp public focus for years. Even after Sister Hyer was successful in making available services for women seeking surgical sterilization, the issue of choice lived on.

In 1993, Boss pressed the matter even further when Santa Cruz Medical Clinic filed suit against Dominican Hospital over what their attorneys claim are trade practices that drive up prices in the local market.

Despite the prevailing historical references to the contrary, Boss continues to allege that Dominican is charging Medical Clinic patients higher fees for services and impinging local competition. Not that the lawsuit seems to be making much headway.

A recent tentative ruling by

United States District Judge Ronald Whyte rules that the litigation filed by attorneys for the Clinic may be significantly reduced in scope.

With the ruling still in preliminary form, attorneys for both sides have filed additional motions.

However, should Justice Whyte uphold his first ruling, then the majority of the Clinic's case against Dominican will have been purged prior to being argued in court.

Among the significant issues addressed in the 41 page preliminary ruling were:

— The Clinic is prohibited from filing suit challenging Dominican Hospital's purchase of AMI's Community Hospital because the Clinic failed to show that it had the ability to bid to purchase the facility, or that it was previously in competition with Dominican, or that the fact that physicians from the Clinic used Community Hospital could be considered sufficient cause to allow The Clinic to object to the sale of the hospital.

— The Clinic can not litigate on behalf of TakeCare or Sutter Health for damages since even if the claims were sustained, the Clinic could not show it was the injured party.

— The Clinic is barred from claiming that the newly formed physicians group (Physicians Services Inc) would damage the Clinic's standing as the dominate multi-specialty group in the county, since anti-trust laws are not designed to alleviate suffering on the part of competitors in the market, but are written to assure competition in the market and that competition in the market is upheld by the presence of more competitors.

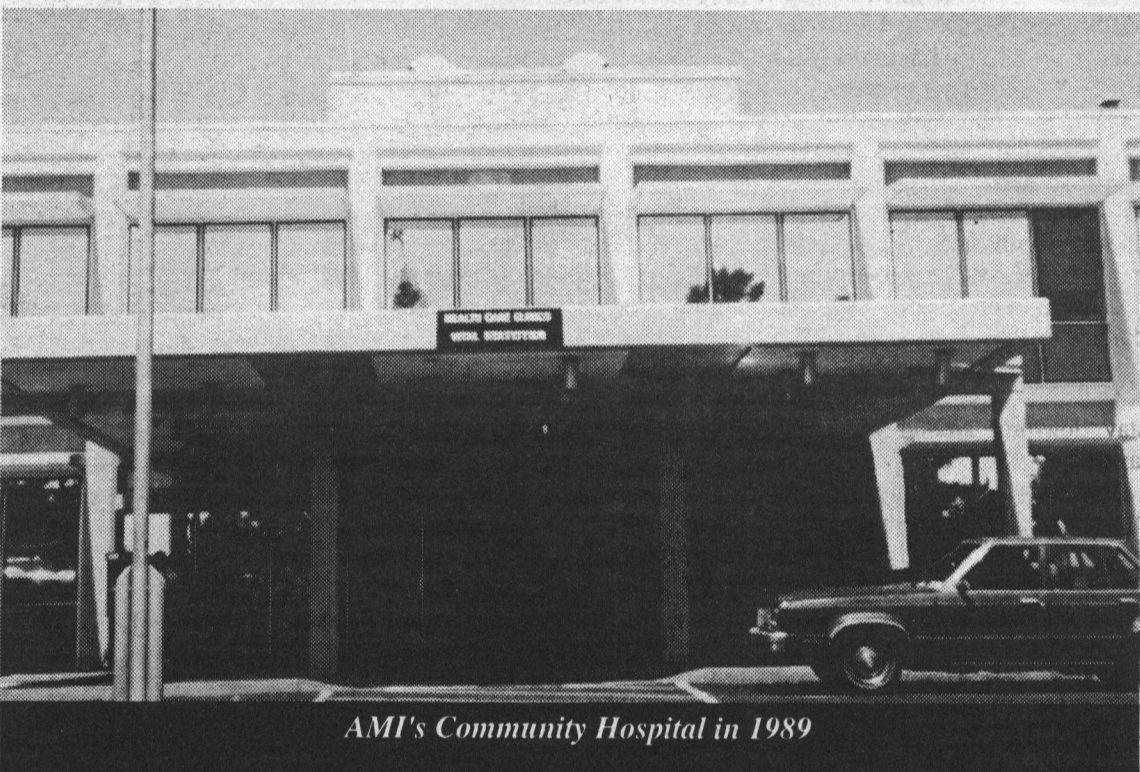
Should the ruling stand, then the Clinic will be permitted to continue to pursue the court action as the lawsuit pertains to: costs the Clinic may have incurred in paying for health care for its employees; losses the Clinic may have experienced because of Dominican's influence on referrals in the home health market; and losses suffered if it is proven that Dominican Hospital has illegally influenced physician contracting in the market.

"We believe we will also prevail in district court," said Sister Hyer. "Although, I would like to add that we have found that sometimes it costs almost as much to be proven right as it does to be proven wrong. ... We would like to think that there exist much better ways to employ our valuable health care resources than simply repeating the lessons we have already learned.

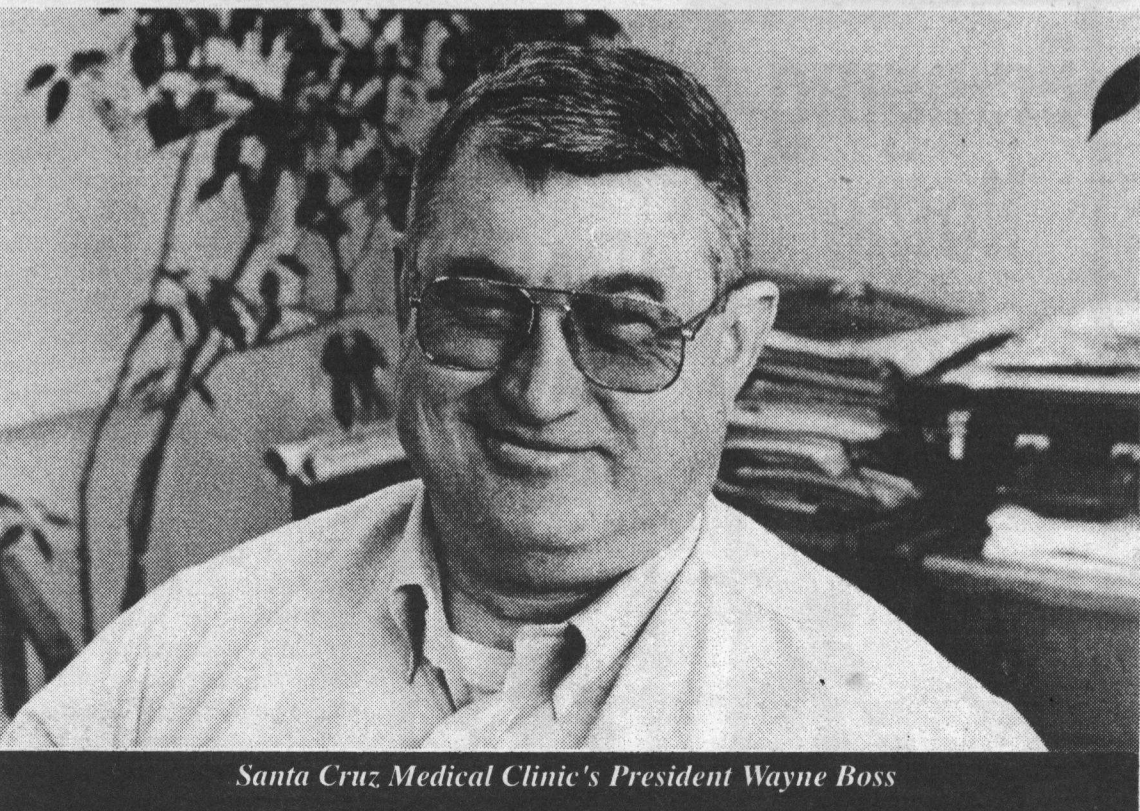
Unfortunately, this is not our decision to make." □



Dominican Hospital's President Sister Julie Hyer



AMI's Community Hospital in 1989



Santa Cruz Medical Clinic's President Wayne Boss